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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.
No. 981.

PETITIONER'S PETITION FOR REHEARING.

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To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

On behalf of petitioner, Lillian I. Randall, we hereby petition the Court for a rehearing and further consideration of the questions presented by this petition for writ of certiorari to the Supreme Court of Missouri, for the reason that we believe, in good faith, that certain matters of fact and matters of law inadvertently have been overlooked by the Court in its judgment of April 6, 1942, denying petitioner's said petition.

Among the material matters of fact and matters of law which we believe were overlooked by the Court in arriving at its conclusion to deny the writ, are the following:

1. We believe, in good faith, that the Court has overlooked giving consideration and effect to the circumstance that the federal questions involved were not decided on their merits by the state court, and that in last analysis this petition is an original complaint against the state.

Assuming that the petition for the writ states a cause, which we believe it clearly does, then denial of the writ denies a hearing, in the first instance, on a claim of constitutional right and converts constitutional rights stated in positive terms of universal application to the character of claims to be considered at the discretion of the Court in which they are made, and subordinates the Constitution of the United States to the law and action of the state against which the language of the Constitution directs itself in prohibitive terms. It was not the intention of the framers of the Constitution that the state should be the judge of its own wrongs against the Constitution or exercise any discretion with respect thereto. Neither was it the intention that enforcement of rights under the Constitution, or of federal law enacted under and in conformity with it, should be administered by grace in the discretion of state or federal court, and applied in each or any particular case.

We here are considering a case in which the state court has refused to decide federal questions, clearly substantially involved—a case of petition for hearing on and adjudication of federal questions not decided, and a first instance decision, of which is sought in this court, it being the only court vested with original jurisdiction under the circumstances.

We here are not concerned with a case in which a state court had federal questions before it which it decided and which this Court could, on examination of the record presented, determine whether or not the decision was right. Further, we, in good faith, believe that we are not here concerned with a petition which does not state a case. In cases such as are excluded from consideration by this paragraph, this Court long has held that formerly writ of error and laterally certiorari is not to be awarded as of right. With that ruling no one can seriously disagree. However, we do not find an instance, and doubt that there is an instance, in which this Court either has held that the writ should not issue as of right in such a case as is mentioned in the next preceding paragraph—the instant case—or, for that matter, has either considered or ruled one way or the other on such a case. We do believe, however, and urgently suggest, that the question is fundamental and of universal interest and ought to be settled by a considered opinion of this Court.

We, in good faith, believe that in legal effect the denial of petitioner's petition has made the protection claimed under the Constitution to be not a right of universal application, but a matter of judicial grace to be dispensed by the Court in its discretion.

This may be demonstrated thus: Petitioner complains (a) that the state trial court tried one case and adjudged another which was not tried, and on which petitioner was not heard either by pleading or trial of issues joined, and that whatever the state court may have construed its law to permit, that judgment was entered in circumstances prohibited by the Constitution; and then (b) petitioner complains that the State Supreme Court, in the first instance, held that the state law authorized the judgment to be entered under these circumstances, and that, therefore, it was not necessary to consider whether or not the Constitu-

tion of the United States forbade it. The petition seeks review of these rulings invoking the protection of the Constitution in respects in which it guarantees the citizen against action by the state. The petition is directed, in last analysis, against the state action taken by its Supreme Court. Only this Court has jurisdiction to secure to the citizen his rights against the state acting through its Supreme Court. It essentially, in such case, is an original jurisdiction. We respectfully suggest that the writ ought to issue of right in such case, if the petition states a case. Otherwise the constitutional guaranty against the state action complained of is denied to the particular petitioner without a hearing, and its enforcement and hearing thereon made to become a matter of grace to be awarded or withheld at the Court's discretion, a result which this Court, in so far as we can discover, has never affirmed to be the law.

Construction of section 344-b (28 U. S. C. 344-b) is directly involved. If that section is procedural, then we believe our suggestion above is wholly meritorious. If the section is an enactment of substantive law purporting to relegate hearing and adjudication of complaint of violation of constitutional guaranty against invasion by the state to the position of hearing and adjudication as a matter of grace at the discretion of the federal court vested with original jurisdiction (in the sense of the first court whose jurisdiction may be invoked thereto) of the complaint, then it emasculates the Constitution and makes constitutional rights guaranteed in positive terms of universal application to depend upon judicial grace awarded or withheld at judicial discretion to or against the particular citizen, and loses its character, both as a constitutional guaranty and as a law. So construed, section 344-b itself would be rendered unconstitutional as an attempt by the Congress to modify the Constitution by statute.

Of course, though the invoking litigant, we are not advised by the denial of the writ of the reason for its denial, and must, therefore, assume that the Court concurred in the view of the state court, that is, that the matter of complaint did not state a case, since, in legal effect, the state law as construed and applied in the particular case by the state court permitted to be done what was done, and, therefore, inquiry as to whether or not the state law, so construed and applied, conflicted with the Federal Constitution need not be inquired into; differently stated, the very evil anticipated, and against which the constitutional guaranty is directed, is made to become, if perpetrated, a bar to constitutional inquiry as to its perpetration and remedy against it. This result impresses us with a deeply-grounded abhorrence against the validity of that reasoning and conclusion.

2. We refrain from extended discussion of the merits of the petition, believing, as we do, that its merits are adequately stated in and made to appear on it. However, we do want to call to the Court's attention anew that included within the scope of the matter considerations above suggested are the complaints particularly:

(a) To the general effect that the judgment of the state trial court violated the Fourteenth Amendment, it being entered on a cause on which petitioner was not heard nor afforded opportunity to be heard, and as to which neither the state court nor this Court can be advised from the record as to what would be petitioner's defenses, if sued on the cause on which the judgment was rendered, or as to the completeness or legal effect of her defenses (Questions 5 and 6).

(b) To the general effect that the State Supreme Court refused to consider the constitutional issues through subordinating, in effect, the Federal Constitution to the state

law as construed and applied in the particular case (Questions 3 and 4).

3. We particularly urge further consideration of two other questions:

(a) To the general effect that an assessment may not be made for a local improvement against lands which, on the face of the proposed improvement, could not be benefited, and which certainly and clearly were excluded from any benefit from the levee, by being excluded from enclosure within it, it being the primary improvement, the assessment being on a parity with that against lands of like elevation which were clearly totally benefited by the levee by being wholly enclosed within it (Questions 1 and 2).

(b) To the general effect that the result of adopting a total new amended plan for reclamation and the imposition of a total new assessment based wholly and independently upon it, as constituting an abandonment of or as superseding the prior original plan and assessment on it, is to be determined, in the particular case, by construing an intention into proceedings under the state statute inconsistent with the statute, to the exclusion of construction of the statute itself, constituted judicial taxation by special law applicable to a particular property and person only (Question 7).

3. Our understanding of the proper function of a petition for rehearing is that it be a constructive criticism of the judgment made with the ends in view.

First, to aid the Court in discovering weaknesses or errors in judgment.

Second, to protect litigants against loss of their lawful rights through such errors.

Constructive criticism can be written only by counsel who have diligently studied their case, believe honestly and

sincerely in their position, hold a proper attitude of respect for and confidence in the Court, and a tolerance of the views of opposing counsel. We profess to qualify on these terms as counsel filing this petition; and we trust this petition will incite the further study which the case merits.

Respectfully submitted,

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Certificate of Counsel

In compliance with the rule of this Court, we, as counsel for the petitioner for whom the foregoing petition is filed, certify that this petition is filed in good faith, and is believed by petitioners, as well as counsel, to be meritorious.

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